

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

VIVIAN GAGLIANO et al. v. ADVANCED SPECIALTY CARE, P.C., et al.,
SC 19804

Judicial District of Danbury

Medical Malpractice; Agency; Whether Appellate Court Correctly Determined that Evidence Insufficient to Support Finding that Medical Resident was Actual Agent of Hospital. Vivian Gagliano was injured during surgery at Danbury Hospital. She and her husband brought this medical malpractice action against the hospital and the medical resident who had assisted the attending physician during the surgery. After trial, the jury returned a verdict for the plaintiffs on finding that the resident was an actual agent of the hospital and therefore that the hospital was vicariously liable for his actions. The trial court refused to overturn the verdict and rendered judgment for the plaintiffs. The hospital appealed and the Appellate Court (167 Conn. App. 826) reversed the judgment on determining that there was insufficient evidence from which the jury reasonably could have found that the hospital had a right to control the resident's performance such that the resident was the hospital's agent for purposes of assisting in the surgery. The court explained that the evidence could not establish that there was an understanding between the resident and the hospital that the hospital would be in control of his performance during the surgery. The court stated that although the evidence suggested that the resident's relationship to the hospital was controlled by a residency agreement, no agreement was admitted into evidence, and, consequently, the jury was left with an incomplete picture of the residency program and of the nature of the parties' relationship. Moreover, the court stated that the evidence suggested that only the attending physician was in control of the resident during the course of the surgery, and it observed that the hospital did not dictate how the physician was to utilize the assistance of the resident and that there was no evidence of standard procedures that regulated the conduct of physician and resident during surgery. Finally, the Appellate Court determined that the plaintiffs' reliance on the hospital's staff manual to prove an agency relationship was misplaced as it was unclear whether the manual was intended to regulate surgical procedures. The plaintiffs appeal, and the Supreme Court will decide whether the Appellate Court properly reversed the judgment against the hospital on determining that the evidence admitted at trial was insufficient to support the jury's finding that the resident was the hospital's agent for purposes of assisting in the plaintiff's surgery.

STATE *v.* EARL SIMPSON, SC 19846*Judicial District of New Haven*

Criminal; Whether Trial Court Erred in Failing to Conduct Hearing on Defendant's Motion to Withdraw his Plea and on his Request for New Counsel.

The defendant was convicted of murder pursuant to his plea of guilty. He appealed, claiming that the trial court erred in denying his motion to withdraw his guilty plea prior to sentencing and in failing to address his complaints concerning his attorney and his request that he be appointed new counsel. The Appellate Court (169 Conn. App. 168) reversed the defendant's conviction, concluding that the trial court abused its discretion in failing to conduct an evidentiary hearing on the defendant's motion to withdraw his guilty plea and on his request for new counsel. It found that the trial court should have conducted a hearing to determine if the defendant understood the nature of the charge to which he pleaded, noting that the defendant had sent letters to the court that conveyed his confusion about the nature of the charge and that those letters furnished a basis for a plea withdrawal under Practice Book § 39-27. The Appellate Court determined that the trial court should have held a hearing on the defendant's request for a new attorney because the defendant's letters to the court sufficiently alerted the court to a seemingly substantial complaint concerning a breakdown in the attorney-client relationship and because there was no indication that the defendant had ever abandoned his request that he be appointed a new attorney. The state appeals, and the Supreme Court will decide whether the Appellate Court properly reversed the defendant's conviction on concluding that the trial court erred in failing to conduct a hearing on the defendant's motion to withdraw his plea and that it erred in failing to conduct a hearing on the defendant's request for a new attorney.

STATE *v.* NORMAN P., SC 19863*Judicial District of Hartford*

Criminal; Evidence; Whether Trial Court Erred in Excluding Defendant's Written Statement to Police from Evidence; Whether Exclusion was Harmless Error; Whether Defendant Entitled to In Camera Review of Complainant's Privileged Records from Sexual Abuse Treatment Center.

The defendant was convicted of sexual assault in a spousal relationship and assault of an elderly person in connection with an incident involving his wife, the complainant. He appealed to the Appellate Court (169 Conn. App. 616), which reversed the judgment of conviction and remanded the

matter for a new trial. The Appellate Court held that the trial court improperly refused to admit the defendant's full written statement to the police into evidence after the state had already introduced portions of the statement. The defendant had sought to introduce the full statement under § 1-5 (b) of the Connecticut Code of Evidence, which provides that "[w]hen a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it." The trial court had excluded the statement as self-serving hearsay under *State v. Jackson*, 257 Conn. 198 (2001), and the Appellate Court concluded that the trial court misapplied *Jackson* where *Jackson* stands for the proposition that whether a statement is self-serving hearsay is irrelevant to whether it is admissible under § 1-5 (b). The Appellate Court also determined that the exclusion was harmful to the defendant because the trial was a "credibility contest," the state's case was weak, and the full statement would have provided the jury with a better context in which to evaluate the defendant's credibility and consider the state's references to the portions of the statement that had been admitted into evidence. The Appellate Court further held that the trial court improperly denied the defendant's request that it conduct in camera review of the complainant's privileged records from a sexual abuse treatment center for information that could be used to impeach the complainant. The Appellate Court determined that the defendant made a sufficient threshold showing for in camera review where his offer of proof was specific and adequately set forth the issue for which he sought the confidential information. This is the state's appeal from the Appellate Court upon grant of certification. The Supreme Court will decide whether the Appellate Court correctly concluded that the trial court misapplied *Jackson* to a claim of admissibility under § 1-5 (b), and if so, whether the Appellate Court correctly determined that the defendant demonstrated that the error was harmful. The Supreme Court will also decide whether the Appellate Court properly concluded that the defendant was entitled to an in camera review of the complainant's privileged records from a sexual abuse treatment center.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

JULIAN MARQUEZ *v.* COMMISSIONER OF CORRECTION, SC 19889
Judicial District of Tolland at Rockville

Habeas; Whether State Violated its Obligation Under *Brady v. Maryland* to Disclose Evidence Favorable to the Defense. The petitioner brought this habeas action alleging that the state violated his right to a fair trial in failing to disclose evidence favorable to him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He claimed that the state failed to disclose that it had an agreement with his codefendant, Edwin Soler, to provide Soler with leniency in his case in exchange for his testimony against the petitioner. At the petitioner's criminal trial, Soler testified for the state and indicated that he was not promised anything in return for his testimony and that he was testifying because it was the "right thing to do." The habeas court denied the petitioner relief, finding no credible evidence of a deal between the state and Soler, and it denied him certification to appeal. The Appellate Court (170 Conn. App. 231) affirmed the habeas court's judgment, concluding that the habeas court did not abuse its discretion in denying certification to appeal. It found that the habeas court's determination that there was no plea deal was not clearly erroneous because the evidence showed that, while the state had normal plea bargaining discussions with Soler, those discussions did not result in any agreement. The petitioner appeals, and the Supreme Court will determine whether the Appellate Court properly found that the habeas court did not abuse its discretion in denying the petitioner certification to appeal and properly found that the habeas court's determination that Soler did not have a deal with the state was not clearly erroneous.

THOMAS VENTURA *v.* TOWN OF EAST HAVEN et al., SC 19898
Judicial District of New Haven

Governmental Immunity; Whether Appellate Court Correctly Determined that Town Immune from Suit Because Towing Rules did not Impose Ministerial Duty on Police Officer. An East Haven police officer responded to a report that an irate male who was possibly on drugs or drunk was in his truck in a McDonald's drive-through lane. After interviewing the man, Vladimir Trnka, the officer drove him to his home, leaving the truck in the McDonald's parking lot but giving him the keys. Less than one hour later, Trnka retrieved the truck from the parking lot and drove it to an intersection, where he struck the plaintiff. It was later determined that the license plate affixed to the truck did not match the vehicle to which it had been assigned and that Trnka was driving the truck without a valid registra-

tion or insurance. The plaintiff subsequently brought this action against the defendant town of East Haven, alleging that the police officer's failure to have Trnka's truck towed from the parking lot violated a ministerial duty imposed on the officer by the town's towing rules. The jury found in favor of the plaintiff, determining that the officer violated a ministerial duty, and the trial court rendered judgment on a \$6 million verdict for the plaintiff. The town appealed, and the Appellate Court (170 Conn. App. 388) reversed and remanded the case to the trial court with direction to render judgment in favor of the town. The Appellate Court held that the trial court improperly denied the town's motion for a directed verdict, concluding that the towing rules did not impose a clear ministerial duty requiring the officer to tow Trnka's truck and that the trial court, and not the jury, should have determined whether the towing rules imposed a ministerial duty on the officer. It concluded that, although one paragraph of the towing rules provides that all motor vehicles involved in motor vehicle violations would be towed, the rules did not impose a ministerial duty on the officer because they also provide that a police officer's discretion would prevail regarding which vehicles would be towed. Finally, the Appellate Court emphasized that the towing rules were directed at tow truck operators, not police officers, and it determined that an interpretation of the towing rules that would require police officers to tow a motor vehicle in every situation in which a violation of the motor vehicle laws had occurred would lead to bizarre and unworkable results. The plaintiff appeals, and the Supreme Court will decide whether the Appellate Court correctly determined that the town was immune from suit because the towing rules did not impose a ministerial duty on the officer to tow the truck.

STATE *v.* KENNETH LEE MCCOY, SC 19905
Judicial District of New Haven

Criminal; Whether Appellate Court Properly Decided that Prosecutorial Impropriety did not Deprive Defendant of a Fair Trial; Whether Appellate Court Properly Concluded that Trial Court Lost Jurisdiction Over Defendant's Motion for New Trial After he was Sentenced; Whether Trial Court Improperly Sentenced Defendant While his Motion for New Trial was Pending. The defendant was convicted of murder in connection with a shooting death. On appeal, he claimed that the prosecutor engaged in impropriety when, during closing argument, she referred to the contents of a conversation between a witness to the shooting, Tramont Murray, and Murray's mother, which was not in evidence. He also claimed that the

prosecutor improperly attempted during direct examination of Murray to elicit his prior consistent statements to the police identifying the defendant as the shooter despite the trial court's order not to do so. His final claim was that the trial court improperly dismissed his motion for a new trial for lack of jurisdiction on the ground that he had already been sentenced. The defendant had been sentenced while his motion for a new trial was pending. The Appellate Court (171 Conn. App. 311) rejected the defendant's claims and affirmed his conviction. It first acknowledged that the prosecutor engaged in impropriety when she asked the jury to speculate as to the contents of a conversation between Murray and his mother that had not been admitted into evidence. It also opined that the prosecutor may have improperly disregarded a trial court order when she attempted to elicit Murray's prior consistent statements to the police. It nevertheless determined that any prosecutorial improprieties did not deprive the defendant of a fair trial because they were infrequent in the context of the defendant's week long trial, they were not severe, and the trial court promptly responded with curative instructions. The Appellate Court also emphasized that the prosecutor never actually succeeded in eliciting Murray's prior consistent statements. It also held that the trial court properly dismissed the defendant's motion for a new trial on the ground that it lacked subject matter jurisdiction because the defendant already had been sentenced. In doing so, it rejected the defendant's claim that, under *State v. Myers*, 242 Conn. 125 (1997), the trial court retained jurisdiction to entertain the motion for a new trial after sentencing because a criminal judgment may be opened and modified within four months of a defendant's sentence having been imposed. The court reasoned that *Myers* did not directly address the jurisdictional issue. The defendant appeals, and the Supreme Court will determine whether the Appellate Court properly decided that, notwithstanding any improper conduct by the prosecutor, the defendant was not deprived of a fair trial. It will also determine whether the Appellate Court properly concluded that the trial court lost jurisdiction to hear the defendant's motion for a new trial and whether the trial court improperly sentenced the defendant while his motion for a new trial was pending.

TOWN OF LEDYARD *v.* WMS GAMING, INC., SC 19917
Judicial District of New London

Appellate Jurisdiction; Final Judgment; Whether Appellate Court Properly Dismissed Appeal from Judgment Awarding Attorney's Fees for Lack of Jurisdiction Where Amount of Fee Award had yet to be Determined. The plaintiff town brought this

action to collect unpaid personal property taxes that it had imposed on slot machines that the defendant company owned and leased to the Mashantucket Pequot Tribal Nation for use in its gaming facilities. After a federal court ruled in a separate action brought by the tribal nation that the town's authority to impose the taxes was not preempted by any federal law, the parties to this state action executed a stipulation agreeing that the defendant had tendered payment to the town for all outstanding taxes, accrued interest and accrued penalties. The parties also agreed that the town was entitled under General Statutes § 12-161a to reasonable attorney's fees incurred in pursuing the state action. The statute allows a municipality to collect attorney's fees from the owner of the personal property when it institutes a proceeding to enforce collection of delinquent personal property taxes. The parties disputed, however, whether the defendant was liable under the statute for attorney's fees incurred by the town in defense of the federal action to which the defendant was not a party. The trial court ruled that the defendant was liable for the federal action attorney's fees pursuant to § 12-161a and it indicated that a hearing would be scheduled to determine the amount of those attorney's fees. The defendant filed an appeal from the ruling before the trial court determined the amount of the federal action attorney's fees to which the town is entitled, and the plaintiff moved to dismiss the appeal, claiming that the defendant had not appealed from a final judgment. The Appellate Court (171 Conn. App. 624) granted the plaintiff's motion and dismissed the appeal for lack of subject matter jurisdiction. The Appellate Court stated that, while a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined, the trial court had not rendered a judgment disposing of the merits of the action and its decision rendering summary judgment as to liability only with respect to the attorney's fees was not an appealable final judgment absent a determination of the amount of the attorney's fees awarded. The defendant appeals, and the Supreme Court will decide whether the Appellate Court properly dismissed the defendant's appeal as premature.

ANN BROWNING et al. v. VAN BRUNT, DUBIAGO & CO., et al.,
SC 20010

Judicial District of Stamford/Norwalk at Stamford

Probate; Trusts; Standing; Whether Trial Court Properly Dismissed Trust Beneficiaries' Breach of Contract Claim on Ground that Beneficiaries Lacked Standing to Bring It. The plaintiffs are siblings and they are beneficiaries of a trust established by their father. They brought this action alleging that defendants Dougherty &

Company (Dougherty), a financial services firm that held assets of the trust, and Thomas Olander, a broker and investment advisor employed by Dougherty, were in breach of a contract with the plaintiffs. The plaintiffs claimed that the defendants breached their duties to the plaintiffs as beneficiaries under the deed of trust by allowing the former trustees to make unauthorized withdrawals of trust assets. Dougherty and Olander moved that the action be dismissed as to them, claiming that the plaintiffs as trust beneficiaries lacked standing to bring their breach of contract claim and that the present trustee was the proper party to bring the claim. The trial court agreed and granted the motion to dismiss. The trial court noted the well established principle that the trustee of a trust is the proper party to bring an action against any party who wrongfully interferes with the trust's interests, and it rejected the plaintiffs' urging that the court apply an exception to that principle where the plaintiffs claimed that the trustee has improperly refused or neglected to bring such an action. The trial court observed that the plaintiffs had not alleged that they had asked the present trustee to bring an action against the defendants and that the present trustee had refused or that the present trustee had otherwise acted imprudently so as to give the plaintiffs standing to pursue the breach of contract claim as beneficiaries. The plaintiffs appeal from the trial court's dismissal. The Supreme Court will decide in this appeal whether the trial court properly dismissed the plaintiffs' breach of contract claim on the ground that, as beneficiaries of the trust, they lacked standing to bring the claim.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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